

JUDGE SCHEINDLIN

10 CV 8342

Thomas M. Furth (TF 0785)
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Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

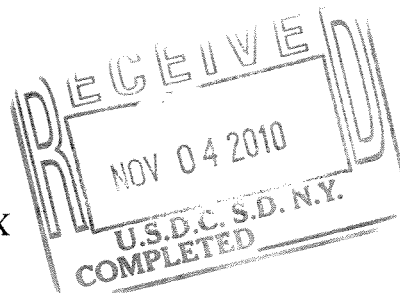
-----X
AMERICAN NETWORK, INC.,

Plaintiff,

v.

SORENSEN COMMUNICATIONS, INC.,

Defendant.
-----X



Civil Action No.

COMPLAINT

Plaintiff, American Network, Inc., by its attorneys, for its complaint against Defendant, states and alleges as follows:

THE PARTIES

1. Plaintiff American Network, Inc. (hereinafter "Plaintiff" or "ANI") is a Delaware corporation with its principal place of business at 142 East 39th Street, New York, New York 10016.

2. Upon information and belief, Defendant Sorenson Communications, Inc. (hereinafter "Defendant" or "Sorenson") is a Utah corporation with its principal place of business at 4192 South Riverboat Road, Salt Lake City, Utah 84123.

JURISDICTION AND VENUE

3. This is an action for a Declaratory Judgment under 28 U.S.C. § 2201. Plaintiff seeks a declaration from this Court that its use of the term "FreeCaptionCall" in connection with its captioned telephone services for hearing-impaired persons does not infringe Defendant's alleged trademark rights under 15 U.S.C. § 1114(1)(a); and does not constitute false designation of origin under 15 U.S.C. § 1125(a). This action also seeks cancellation of Defendant's U.S. Trademark Registration No. 3,525,999.

4. This action arises under the United States Trademark Act, 15 U.S.C. §§ 1051-1127 and the Declaratory Judgment Act, 28 U.S.C. § 2201 and subject matter jurisdiction is based upon 28 U.S.C. §§ 1331 and 1338.

5. This Court has personal jurisdiction over Sorenson because, upon information and belief, (1) Sorenson has transacted business within this state and district, and (2) Sorenson has made and established contacts with this state and district sufficient to permit the exercise of personal jurisdiction.

6. Venue is proper in this district under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to these claims occurred in this district and because Sorenson resides in this district within the meaning of 28 U.S.C. § 1391(c).

FACTS COMMON TO ALL COUNTS OF COMPLAINT

7. Plaintiff ANI provides telecommunications services, including captioned relay services for the hearing-impaired. ANI has been providing telecommunications services nationally since 1994.

8. In December 2009, ANI adopted the term FreeCaptionCall for use in connection with promoting its telecommunications services for the hearing-impaired. Since then it has used the term on the Internet and in promotional materials for its services.

9. ANI also uses the terms PhoneCaption and FreeCaptioning in connection with its services.

10. ANI applied to register the trademarks FreeCaptionCall, PhoneCaption and FreeCaptioning in the United States Patent and Trademark Office (“PTO”) under, respectively Application Serial Nos. 77696739, 77696766 and 77900452. (In this Complaint, the term “trademark” shall include the term “service mark”).

11. All of ANI’s above-identified applications have been refused registration on the Principal Register on the grounds that the marks are merely descriptive of the services identified in the application. Such marks may be registrable on the Supplemental Register.

12. On or about October 26, 2010, ANI received a letter from Defendant Sorenson’s counsel, advising ANI that Sorenson asserts exclusive rights to the term CAPTIONCALL and that ANI is infringing upon those rights. Sorenson relies on its Supplemental Register Trademark Registration No. 3,525,999.

13. Sorenson's letter demands that ANI:

"1. Immediately cease and desist any and all use of the mark FREECAPTIONCALL, or any other mark confusingly similar to our client's mark; 2. Expressly abandon the United States and any foreign application(s) for the FREECAPTIONCALL mark, including but not limited to application Serial No. 77/900,452 with prejudice; 3. Provide written assurances that you will not use or register any new trade names, marks or domain names containing the term CAPTIONCALL, or any confusingly similar terms, in the future; and 4. Immediately take down all material referencing FREECAPTIONCALL from the domain name <freecaptioncall.com>."

14. The letter then states that "in naming specific causes of action above, we do not intend to catalogue all possible causes of action arising as a result of your infringing activities. Nothing herein should be deemed to waive any of our client's rights, claims or remedies," and closes with the warning that "Failure to comply with the above will be regarded as further evidence of the willful and intentional nature of your violations." The letter requests a response within two weeks. A copy of the letter with its exhibits is attached hereto as Exhibit A.

15. Defendant's threat to take legal action interferes with ANI's ability to continue to use the term FreeCaptionCall in its legitimate business operations. ANI has used, and continues to use FreeCaptionCall to promote its services and develop goodwill in the term FreeCaptionCall as used in connection with its caption calling services.

16. Plaintiff requires declaratory relief so that it may continue in its business without threat of the litigation which is clearly contemplated by the letter from Defendant's counsel. Plaintiff has an immediate practical interest in obtaining a judicial declaration of its right to use FreeCaptionCall in connection with its services.

COUNT I
DECLARATION OF NON-INFRINGEMENT UNDER THE LANHAM ACT

17. Plaintiff repeats and re-alleges each and every allegation contained in Paragraphs 1 through 16 hereof.

18. A justiciable and actual controversy exists before this Court with respect to whether Plaintiff's continued use of the term FreeCaptionCall infringes any of Defendant's alleged rights under the Lanham Act, 15 U.S.C. § 1051 et seq.

19. Plaintiff ANI's continued use of the descriptive term FreeCaptionCall is not likely to cause confusion as to the source or sponsorship of ANI's telecommunications services for hearing-impaired persons and services that Defendant Sorenson offers using the generic, or at best descriptive, term CaptionCall.

20. ANI's web-based service that provides users with access via the freecaptioncall.com website is significantly different from the telephone hardware that Sorenson will offer its customers using the term CaptionCall.

21. The terms FreeCaptionCall and CaptionCall themselves are significantly different. They differ in sound and appearance and the addition of the term "Free" creates an additional distinct commercial connotation.

22. Upon information and belief, Defendant offers its service in connection with a “license” that customers must purchase to obtain a captioning-enabled telephone device from Defendant.

23. In contrast, Plaintiff ANI’s service requires no specialized telephone and no payment of a fee. It is a free Internet-based service that requires no hardware or software other than Internet access.

24. Hearing-impaired individuals, who are predominantly the consumers for Plaintiff’s and Defendant’s services, have access to materials and literature concerning the evolving technology in communications for the hearing-impaired. As such, they are well-informed and keenly aware of the differences between various specialized products and services being offered by different vendors. Such consumers easily recognize the difference between Plaintiff’s free service via the Internet and Defendant’s service that is available only upon purchase of a “license” costing \$149.00 to obtain specialized telephone equipment.

25. Defendant’s application to register CaptionCall was rejected by the PTO for registration on the Principal Register. To obtain registration, Sorenson was required to amend its application to the Supplemental Register. Registration on the Supplemental Register does not provide the benefits that are conferred by Sections 7(b) and 32 of the Lanham Act, 15 U.S.C. §§ 1057(b) and 1115 on Principal Register registrations.

26. The words “caption” and “call” are used together ubiquitously in common parlance related to telephone services for the hearing-impaired. At best, Sorenson’s use of CaptionCall is descriptive. For this reason, Defendant’s registration on the Supplemental Register is entitled to extremely narrow protection, if any. Indeed, as detailed below, CaptionCall is actually a generic term that is not registrable.

27. Plaintiff's continued use of the term FreeCaptionCall in connection with its caption calling services does not infringe any of Defendant's alleged rights under 15 U.S.C. § 1114(1)(a).

28. Plaintiff requests a declaration from the Court that its continued use of the term FreeCaptionCall in connection with its caption calling services does not infringe any of Defendant's alleged rights under 15 U.S.C. § 1114(1)(a).

COUNT II
DECLARATION OF NO FALSE
DESIGNATION OF ORIGIN UNDER THE LANHAM ACT

29. Plaintiff repeats and re-alleges each and every allegation of Paragraphs 1 through 28 hereof.

30. A justiciable and actual controversy exists before this Court with respect to whether Plaintiff's continued use of the term FreeCaptionCall infringes any of Defendant's alleged rights under the Lanham Act, 15 U.S.C. § 1125(a).

31. Plaintiff's continued use of the term FreeCaptionCall in connection with its caption calling services is not likely to cause confusion as to source or sponsorship and does not constitute a false designation of origin under 15 U.S.C. § 1125(a).

32. Plaintiff requests a declaration from the Court that its continued use of the term FreeCaptionCall in connection with its caption calling services does not infringe any of Defendant's alleged rights under 15 U.S.C. § 1125(a).

COUNT III
CANCELLATION OF U.S. TRADEMARK REGISTRATION

33. Plaintiff repeats and re-alleges each and every allegation of Paragraphs 1 through 32 hereof.

34. The term “CaptionCall” (or “Caption Call”) is a term that the relevant purchasing public understands primarily as the common name for the services for which it has been registered by Defendant. The term is incapable of functioning as a registrable trademark denoting source and is not registrable in the U.S. Patent and Trademark Office on either the Principal or Supplemental Register. U.S. Trademark Registration No. 3,525,999 was issued improperly by the PTO because CaptionCall is the generic name for the services of the registration, i.e., “telecommunications relay services, namely, facilitating telephonic communications for hearing impaired individuals.”

35. U.S. Trademark Registration No. 3,525,999 should be cancelled pursuant to Section 14 of the Trademark Act, 15 U.S.C. § 1064 as the registered mark is the generic name for the services of the registration.

36. This Court has authority to cancel the subject registration pursuant to Section 37 of the Trademark Act, 15 U.S.C. § 1119.

37. In an Office Action dated March 23, 2010, the PTO refused registration to Plaintiff in its application to register FREECAPTIONCALL on the grounds of likelihood of confusion with Defendant’s registration No. 3,525,999 pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). The existence of Defendant’s generic CaptionCall mark on the Supplemental Register thus operates as a bar to Plaintiff obtaining its registration. Plaintiff is thereby damaged by the continuing existence of Defendant’s trademark registration.

38. Plaintiff requests an order of this Court directing the Director of the United States Patent and Trademark Office to cancel U.S. Trademark Registration No. 3,525,999.

WHEREFORE, Plaintiff respectfully requests that this Court grant it a judgment;

A. Declaring that Plaintiff ANI's continued use of the term "FreeCaptionCall" in connection with its caption calling services does not:

- (1) Constitute trademark infringement under 15 U.S.C. § 1114(1)(a); or
- (2) Constitute false designation of origin under 15 U.S.C. § 1125(a);

B. Permanently enjoining Defendant Sorenson and its officers, agents, servants, employees and attorneys, and all persons in active concert with any of them from challenging Plaintiff's use of the term "FreeCaptionCall" in connection with its caption calling services;

C. Ordering that the Director of the United States Patent and Trademark Office cancel U.S. Trademark Registration No. 3,525,999;

D. Finding this case to be exceptional pursuant to 15 U.S.C. § 1117(a);

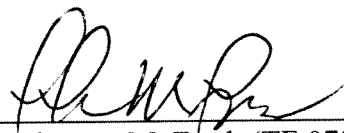
E. Awarding Plaintiff its attorneys' fees, expenses and costs incurred in this action pursuant to 15 U.S.C. § 1117(a) and 28 U.S.C. § 1920; and

F. Awarding to Plaintiff such other and further relief as to the Court may appear appropriate under the circumstances.

Dated: New York, New York
November 4, 2010

Respectfully submitted,

KUDMAN TRACHTEN ALOE LLP

By: 
Thomas M. Furth (TF 0785)

350 Fifth Avenue, Suite 4400
New York, NY 10118
(212) 868-1010

***ATTORNEYS FOR PLAINTIFF
AMERICAN NETWORK, INC.***

EXHIBIT A

Knobbe Martens Olson & Bear LLP

Intellectual Property Law

2040 Main Street
Fourteenth Floor
Irvine, CA 92614
Tel 949-760-0404
Fax 949-760-9502
www.kmob.com

Tirzah Abé Lowe
tlowe@kmob.com

October 22, 2010

VIA CERTIFIED MAIL

Mr. Kent Charugundla
President and CEO
American Network, Inc.
142 E 39th Street
New York, NY 10016-0970

Re: Sorenson Communications, Inc. v. American Network, Inc.
Trademark Infringement, Unfair Competition, and Cybersquatting
Infringing Mark: FREECAPTIONCALL
Sorenson's Mark: CAPTIONCALL
Our Reference No.: SORCO.002TIS

Dear Mr. Carugundla:

We represent Sorenson Communications, Inc. ("Sorenson") in connection with its intellectual property matters, including the enforcement of its trademark rights. Sorenson is a leading provider of products and services for deaf and hard-of-hearing individuals. As you know, Sorenson is the owner of the trademark CAPTIONCALL® in connection with telephonic communication services for the hearing impaired. Sorenson has invested considerable time, effort, and money promoting this mark. To protect its interests, our client has applied for and obtained federal trademark protection for the mark CAPTIONCALL®. Information regarding Sorenson's registration and pending application for the mark is enclosed. See Exhibit A.

It has recently come to our attention that American Network, Inc. ("American") is promoting and seeking registration for the mark FREECAPTIONCALL (Serial No. 77/900,452) for "Captioned telephone services for individuals who are deaf, hard of hearing or speech impaired" in Class 38. Enclosed as Exhibit B is information regarding this application and examples of use of the FREECAPTIONCALL mark on your web site <freecaptioncall.com> and in a flyer.

This letter is to place you on notice that your use of the mark FREECAPTIONCALL is a direct and flagrant infringement upon Sorenson's federally registered mark CAPTIONCALL®. The mark FREECAPTIONCALL is very similar in sound and appearance to our client's mark and, in fact, contains the entire CAPTIONCALL® mark. The addition of the descriptive word "free" does not change the commercial impression of the mark. Moreover, the services offered

San Diego
858-836-9000

San Francisco
415-954-4114

Los Angeles
310-551-3450

Riverside
951-781-9231

Seattle
206-405-2000

Washington, DC
202-640-6400

Knobbe Martens Olson & Bear LLP

Mr. Kent Charugundla
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by your company are identical to Sorenson's services. For years, Sorenson has been in the business of manufacturing and providing customized products, video relay services, and mobile applications for deaf and hard-of-hearing individuals. Further, the services of Sorenson and American travel in identical channels of trade and are directed toward the same customers, namely deaf and hard-of-hearing individuals. Thus, there is a strong likelihood that customers will mistakenly believe there is some affiliation or association between our client's CAPTIONCALL® products and services and your company's FREECAPTIONCALL services.

Further, the United States Patent and Trademark Office agrees with our position. American's federal trademark application for the mark FREECAPTIONCALL was rejected because of a likelihood of confusion with Sorenson's CAPTIONCALL® mark.

Moreover, your use of FREECAPTIONCALL is a clear act of unfair competition, a violation of both state and common laws. Due to Sorenson's strong reputation in the industry, your company should have been aware of Sorenson's rights prior to your adoption of the FREECAPTIONCALL mark. At the very least, you had actual knowledge of Sorenson's CAPTIONCALL® mark when, in an Office Action dated March 23, 2010, the Patent & Trademark Office refused your application in light of Sorenson's CAPTIONCALL registration.

Having actual knowledge of another's mark puts a greater duty on your company to avoid a likelihood of confusion. Despite having actual notice of Sorenson's mark, American continued to brand its captioned telephone services at trade shows under the FREECAPTIONCALL mark. In fact, the attached flyer in Exhibit B was distributed at the recent AARP national convention in September 2010, well after American received actual notice of our client's trademark rights. The fact that your company proceeded with the adoption, and continued promotion, of the FREECAPTIONCALL mark can be interpreted as an effort to take advantage of Sorenson's well-established reputation.

In light of the significant injury to Sorenson occasioned by your above actions, our client demands that American immediately:

1. Immediately cease and desist any and all use of the mark FREECAPTIONCALL, or any other mark confusingly similar to our client's mark;
2. Expressly abandon the United States and any foreign application(s) for the FREECAPTIONCALL mark, including, but not limited to, application Serial No. 77/900,452 with prejudice;
3. Provide written assurances that you will not use or register any new trade names, marks or domain names containing the term CAPTIONCALL, or any confusingly similar terms, in the future; and

Knobbe Martens Olson & Bear LLP

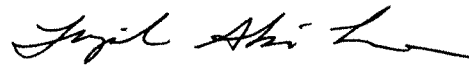
Mr. Kent Charugundla
October 22, 2010
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4. Immediately take down all material referencing FREECAPTIONCALL from the domain <freecaptioncall.com>.

Please note that in naming specific causes of action above, we do not intend to catalogue all possible causes of action arising as a result of your infringing activities. Nothing herein should be deemed to waive any of our client's rights, claims or remedies, all of which are expressly reserved. Failure to comply with the above will be regarded as further evidence of the willful and intentional nature of your violations.

Given the importance of this matter, we request that you provide us with a response within two weeks of the date of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Tirzah Abé Lowe", with a stylized flourish at the end.

Tirzah Abé Lowe

Enclosures

cc: Sorenson Communications, Inc.
9841937
101310

Exhibit A

Int. Cl.: 38

Prior U.S. Cls.: 100, 101, and 104

United States Patent and Trademark Office

Reg. No. 3,525,999

Registered Oct. 28, 2008

**SERVICE MARK
SUPPLEMENTAL REGISTER**

CAPTIONCALL

SORENSEN COMMUNICATIONS, INC. (UTAH
CORPORATION)
4192 SOUTH RIVERBOAT ROAD, SUITE 100
SALT LAKE CITY, UT 84123

FOR: TELECOMMUNICATIONS RELAY SERVICES, NAMELY, FACILITATING TELEPHONIC COMMUNICATIONS FOR HEARING IMPAIRED INDIVIDUALS, IN CLASS 38 (U.S. CLS. 100, 101 AND 104).

FIRST USE 7-2-2008; IN COMMERCE 7-2-2008.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 77-092,309, FILED P.R. 1-26-2007; AM. S.R. 8-8-2008.

B. PARADEWELAI, EXAMINING ATTORNEY



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CAPTIONCALL

Word Mark	CAPTIONCALL
Goods and Services	IC 009. US 021 023 026 036 038. G & S: Telephones, including, captioned telephones, cordless telephones, amplified telephones, video telephones and mobile phones. FIRST USE: 20100730. FIRST USE IN COMMERCE: 20100730
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	77878980
Filing Date	November 23, 2009
Current Filing Basis	1B
Original Filing Basis	1B
Supplemental Register Date	August 24, 2010
Owner	(APPLICANT) Sorenson Communications, Inc. CORPORATION UNITED STATES 4192 South Riverboat Road, Suite 100 Salt Lake City UTAH 84123
Attorney of Record	Tirzah Abe Lowe
Prior Registrations	3525999
Type of Mark	TRADEMARK
Register	SUPPLEMENTAL

Live/Dead Indicator LIVE

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Exhibit B



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FreeCaptionCall

Word Mark	FREECAPTIONCALL
Goods and Services	IC 038. US 100 101 104. G & S: Captioned telephone services for individuals who are deaf, hard of hearing or speech impaired. FIRST USE: 20091204. FIRST USE IN COMMERCE: 20091204
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	77900452
Filing Date	December 23, 2009
Current Filing Basis	1A
Original Filing Basis	1A
Owner	(APPLICANT) American Network, Inc. CORPORATION DELAWARE 142 E. 39th Street New York NEW YORK 10016
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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FreeCaptionCall™

Make Your Free Caption Call

Make a Free Caption Call

Login To Make a Call

UserID

Password

GO

If you have not registered, no problem, [click here to signup](#)
[Lost Password?](#)

Want to reach a FreeCaptionCall user? Call them through our
FreeCaptionCall service first at 888-737-7500 and enter their number and
then press #.

Serving the deaf and hard-of-hearing community



Need Customer Service ?

Call: 800 - 895 - 2000

10am - 5pm(EST.)

[AmericanVRS](#) | [FreeRelay](#) | [PhoneCaption](#) | [Terms & Conditions](#)

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FreeCaptionCall™

Make Your Free Caption Call

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About Us

Difficulty hearing on the phone just became easy! FreeCaptionCall is a free service that caters to individuals who are hard-of-hearing or find themselves having trouble hearing during phone conversations.

Our unique service enables individuals entitled to efficient and user-friendly telecommunication service by transcribing voice to text. Our distinctive web-based service allows you to read captions of what the other person is saying, word of word on your computer screen.



Serving the deaf and hard-of- hearing community

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Why Use FreeCaptionCall?

There are several advantages to using FreeCaptionCall. First, all you need is a computer to receive captions when you are on a call. Second, you do not need to purchase any additional software or technological device to receive captions. Finally, it's a quick and easy way to stay in touch.

Our services are completely free of charge to users!

By taking advantage of FreeCaptionCall, the hard-of-hearing community at large can be assured that they are provided with equal access to facilitated communication.

We Feature:

- Free Captioning for All of Your Phone Calls
- Customizable, TV - Style Captioning
- PassThrough Caller ID
- Full Privacy
- Touch-Tone Pass Through
- Supports English & Spanish



To sign up, visit

www.FreeCaptionCall.com

Servicing The
Hard-of-Hearing
Community



FreeCaptionCallTM

www.FreeCaptionCall.com

How It Works

Individuals who are hard-of-hearing now have a way of communicating on the phone with their hearing counterparts. The hard-of-hearing party simply places a call through FreeCaptionCall and receives what the other person is saying via text captions. As long as you are logged in to www.freecaptioncall.com, captions will appear on a PC or MAC computer screen. Simply log in online, and we'll provide the captions! It's that easy!

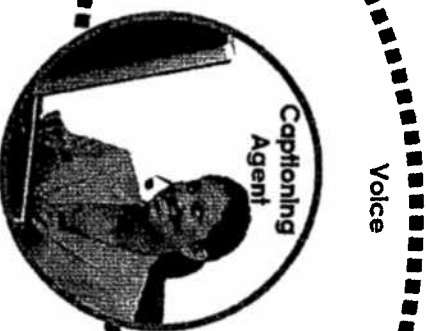


Who We Are

FreeCaptionCall is a completely free, captioning telephone service. We cater to hard-of-hearing individuals who are entitled to efficient and user-friendly telecommunication services.

To ensure this, our qualified Communication Assistants work to make the calls faster and easier for you. Similar to captioned TV, the captions appear in near real time and are completely free of charge.

FreeCaptionCall™



Outreach

At FreeCaptionCall, we help the hard-of-hearing community. We offer all individuals, whether deprived of hearing on a small or larger scale, the functional equivalent to regular telephone communication.

FreeCaptionCall's novel technology allows hard-of-hearing individuals to keep ties intact and communicate with the same ease as their hearing counterparts.

